

Is presidential re-election really allowed in El Salvador? Constitutional Analysis and Supreme Court Rulings.

Nancy Eunice Alas Moreno¹
Sophia University
nalasmoreno@gmail.com
Japan

¿Está realmente permitida la reelección presidencial en El Salvador? Análisis constitucional y resoluciones de la Corte Suprema de Justicia.

Recibido: 16 de enero de 2024

Aceptado: 6 de marzo de 2024

Abstract

This paper thoroughly explores the permissibility of presidential re-election in El Salvador by analyzing constitutional provisions and pivotal rulings of the Constitutional Chamber of the Supreme Court of Justice (CCSCJ), specifically CCSCJ's rulings 163-2013 (25 July 2014) and 1-2021 (3 September 2021). Beginning with a brief historical context, the study provides essential insights into the evolution of the presidential system in El Salvador, establishing a foundation for comprehending historical and legal trends. The analysis meticulously dissects relevant constitutional clauses shaping the presidential system, paving the way for a nuanced examination. Focused on the interpretative milestones set by CCSCJ rulings, particularly those critical decisions, the paper navigates the intricate legal landscape surrounding presidential re-election in El Salvador. In its conclusion, the article addresses the question: Is presidential re-election really allowed in El Salvador? Beyond a simple answer, the study offers

¹ Salvadoran lawyer and assistant professor in the Department of Hispanic Studies at Sophia University, Japan.

insightful reflections on the broader political-legal implications, contributing to a deeper understanding of El Salvador's evolving governance dynamics.

Keywords

Presidential, Re-election, System, El Salvador, Constitution.

Resumen

Este documento explora a fondo la permisibilidad de la reelección presidencial en El Salvador mediante el análisis de las disposiciones constitucionales y las decisiones fundamentales de la Sala de lo Constitucional de la Corte Suprema (SCCSJ), específicamente las sentencias 163-2013 (25 de julio de 2014) y 1-2021 (3 de septiembre de 2021). Comenzando con un breve contexto histórico, el estudio proporciona información esencial sobre la evolución del sistema presidencial en El Salvador, estableciendo una base para la comprensión de las tendencias históricas y jurídicas. El análisis disecciona meticulosamente las cláusulas constitucionales relevantes que conforman el sistema presidencial, allanando el camino para un examen matizado. Centrándose en los hitos interpretativos establecidos por las sentencias de la SCCSJ, en particular aquellas decisiones clave, el artículo navega por el intrincado panorama jurídico que rodea la reelección presidencial en El Salvador. En su conclusión, el artículo aborda directamente la pregunta central: ¿Está realmente permitida la reelección presidencial en El Salvador? Yendo más allá de una simple respuesta, el estudio ofrece reflexiones perspicaces sobre las implicaciones político-jurídicas más amplias, contribuyendo a una comprensión más profunda de la dinámica de gobernanza en evolución de El Salvador.

Palabras clave

Presidencial, Reelección, Sistema, El Salvador, Constitución.

1. Introduction

The current President of El Salvador for the period 2019-2024 (the current President) officially announced on 15 September 2022 that he will run again as a presidential candidate for a second term in the 2024 election. This announcement is based on the ruling number 1-2021 of 3 September 2021 (ruling 1-2021)

²⁾ When referring to the current Constitution of El Salvador, which was adopted in 1983, this Article will use the following expressions: “the current Constitution in force,” “the current Constitution,” or “the Constitution.”

³⁾ Four of the five dismissed Magistrates of the CCSCJ were elected for the period 2018-2027.

⁴⁾ The constitutional action for declaring the loss of citizenship rights is an action that any Salvadoran citizen can file to ask the CCSCJ to declare the loss of citizenship rights of those who promotes and support the presidential re-election. Even though the Constitution comprehends the existence of this action, the CCSCJ needed to establish its procedural rules through decision number 1-2020 of 5 October 2020 (which was the first lawsuit in the country that sought the declaration of the loss of citizenship rights of another citizen who supported the presidential re-election) because there was no legislation to guide the development of this type of lawsuit when it was filed. At that time, the CCSCJ considered the basic principles of procedural law to configure the procedural rules of this constitutional action.

by the Constitutional Chamber of the Supreme Court of Justice (CCSCJ). In this ruling, the CCSCJ interpreted Article 152 (1) of the current Constitution² in the way of allowing the presidential re-election and overturned the ruling number 163-2013 of 25 July 2014 (ruling 163-2013) that restricted the President’s consecutive re-election.

It is important to point out that the above-mentioned ruling 1-2021 was done by the current members of the CCSCJ, who were appointed on 1 May 2021. On that day, the new deputies of the Legislative Assembly for the period 2021-2024 took office, and just right after their appointment, they decided to irregularly dismiss all the legitimate Magistrates of the CCSCJ³ and appoint their replacements. This decision of the Legislative Assembly has been broadly and hardly criticized by the International Community as an intention by the current President to control the CCSCJ through the Legislative Assembly (of which most of its current lawmakers are aligned with the current President) by removing the fragile checks and balances system that existed in the country until 1 May 2021.

The above-mentioned ruling 1-2021 was given in a constitutional case that started with a lawsuit filed before the legitimate Magistrates of the CCSCJ prior to their dismissal. A citizen (plaintiff) filed a constitutional action called “*proceso de pérdida de derechos de ciudadanía*”⁴ in which claimed that in compliance with Article 75 (4) of the Constitution, the CCSCJ should hear the case and pronounce judgment declaring the loss of citizenship of a Salvadoran who was promoting and supporting the re-election or continuation of the current President. The newly appointed Magistrates of the CCSCJ dismissed the complaint regarding the petition of declaration of loss of citizenship rights of the person promoting and supporting the re-election of the current President. However, ironically, they used the ruling 1-2021 as an opportunity to justify the possibility of presidential re-election without being this part of the petition made by the plaintiff in the suit. Notwithstanding the CCSCJ pronounced this ruling in the sense of allowing the presidential re-election in the country, it is worthwhile to note that this declaration was made by Magistrates who were appointed dubiously and took place in a type of constitutional proceeding in which the legal effects of the

ruling apply only to parties to the action (effect *inter partes*) and do not extend beyond those parties (effect *erga omnes*).

In consideration of the foregoing, the following questions arise: Was the ruling 1-2021 delivered by a legitimate court? Was the ruling 163-2013 effectively overturned, or is it still binding? Are the effects of the ruling 1-2021 of obligatory compliance by all Salvadorans? Is presidential re-election really allowed in El Salvador? If presidential re-election is allowed in the country, in which case can a former President run for the presidency again? Or, if presidential re-election is prohibited, in which case is the presidential re-election not allowed by the Constitution and the rulings of the CCSCJ?

The primary purpose of this paper is to analyze the current provisions in the Constitution related to the presidential system in the country and the two main rulings of the CCSCJ (the ruling 163-2013 and the ruling 1-2021) that had interpreted those provisions with the aim to answer these relevant questions. First, this paper will provide the historical background of the presidential system in El Salvador to understand the country's historical and legal tendencies regarding this topic. Second, this paper will address the relevant constitutional provisions related to the presidential system in El Salvador to understand the legal configuration that the Salvadoran Constitution and the Political Parties Act (PPA) provides in this regard. Third, this paper will discuss the two main rulings of the CCSCJ that interpreted the provisions related to the country's presidential system. Finally, and after considering all the above, this article will aim to answer the previously posed questions and provide a conclusion related to the presidential re-election system in the country.

2. Historical background of the presidential system in El Salvador

Since El Salvador separated from Spain in 1821 and became an independent republic, it has had 14 Constitutions. Those Con-

⁵⁾ This enumeration prioritizes mentioning the Constitutions promulgated by El Salvador as an independent republic. Even though in 1824, El Salvador was a State of the Federal Republic of Central America, this enumeration includes the Constitution of the State of El Salvador of 1824 because it was the country's first Constitution. Also, this enumeration does not mention the Constitution of 1885, known as "the frustrated Constitution of 1885" (*la Constitución frustrada de 1885*), because it did not enter into force.

⁶⁾ This Constitution was in force only for one year until the amended Constitution of 1886 was reinstated in 1946.

stitutions are as follows⁵⁾: (a) Constitution of the State of El Salvador of 1824, (b) Political Constitution of the Republic of El Salvador of 1841, (c) Political Constitution of the Republic of El Salvador of 1864, (d) Political Constitution of the Republic of El Salvador of 1871, (e) Political Constitution of the Republic of El Salvador of 1872, (f) Political Constitution of the Republic of El Salvador of 1880, (g) Political Constitution of the Republic of El Salvador of 1883, (h) Political Constitution of the Republic of El Salvador of 1886, (i) Political Constitution of the Republic of El Salvador of 1939, (j) Political Constitution of the Republic of El Salvador of 1945⁶⁾, (k) Political Constitution of the Republic of El Salvador of 1950, (l) Political Constitution of the Republic of El Salvador of 1962, (m) Political Constitution of the Republic of El Salvador of 1982, and (n) Political Constitution of the Republic of El Salvador of 1983.

The current Constitution, in force since 20 December 1983, is the Political Constitution of the Republic of El Salvador of 1983, has 274 Articles, and is the highest-ranking legal body in the country. Chapter II (Articles 150-171) regulates all that concerns the Executive Branch. As a country with a presidential system, the President of the Republic is the head of the State and the Commander-in-Chief (*Comandante General*) of the Armed Forces. Attempts to reform (or completely rewrite) this Constitution has been made since 2019 with the aim to allow consecutive presidential re-election.

To understand the historical background regarding the presidential system in El Salvador is necessary to examine the provisions that concern the presidential term and the possibility, or not, of re-election in the Salvadoran Constitutions since 1824.

2.1. Historical and legal tendencies regarding the presidential re-election in the country

Regarding the issue of presidential re-election in El Salvador, the Constitutions promulgated in the country can be grouped into four groups: (a) Constitutions that allow consecutive presidential re-election, (b) Constitutions that explicitly allow non-consecutive presidential re-election, (c) Constitutions that prohibit consecutive presidential re-election after one term, and (d) Constitutions that are ambiguous about whether presidential re-election is allowed or banned.

The Constitutions that allow consecutive presidential re-election are the ones of 1824 and 1864. The first Constitution that El Salvador had was the Constitution of 1824, while it was a State of the Central American Federation. According to this Constitution, the Head of the State's term of office was four years, and he could be re-elected to only one consecutive term (Article 44). The Constitution of 1864 was promulgated after the country became a republic, and the presidential system was in place since 1841. This Constitution also stated that the presidential term was of four years and allowed the consecutive presidential re-election to only one consecutive term (Article 33).

The Constitutions that explicitly allow non-consecutive presidential re-election are the ones of 1841, 1871, 1872, 1880, 1885, 1886, 1939, and 1945. These Constitutions stated short presidential terms of two (Constitutions of 1841 and 1871), three (Constitution of 1885), or four years (Constitutions of 1872, 1880, 1886, and 1945) and required that Presidents sat out for one term before running for election again. An exception to the trend of short presidential terms is the Constitution of 1939, which was promulgated during an authoritarian military regime. This Constitution stated that the presidential term was six years (Article 92) and mandated that Presidents could only be re-elected after one term had elapsed (Article 94). Even though this, Article 91 (3) created an exception to enforcing Article 94. It stipulated that "for this one time only" (*por esta única vez*), the current President at the time, Maximiliano Hernández Martínez, who became President in 1931 through a *coup d'état*, was able to be continuously re-elected for another term of six years and to continue in office until 1 January 1945 because it was in the "national interest" to do so.

The Constitutions that prohibit consecutive presidential re-election after one term are the ones of 1950, 1962, 1982 and 1983. The Constitution of 1950 stipulated a presidential term of six years, and the Constitutions of 1962, 1982, and 1983 stipulated five years. These Constitutions characterize themselves for not including a provision allowing non-consecutive presidential re-election. Because of this fact, it was unclear if non-consecutive presidential re-election has been proscribed since 1950. This was clarified in 2014 when the CCSCJ held in ruling 163-2013 that

non-consecutive presidential re-election is allowed by the current Constitution in force. That year, the CCSCJ concluded that Presidents could serve one term of five years and could not be re-elected until after two periods (ten years) had lapsed.

The Constitution that is ambiguous about whether presidential re-election is allowed or banned is the one of 1883. This Constitution established in Article 76 that the President's term of office was four years. However, it contained no provision regarding prohibiting or allowing the presidential re-election as the previously mentioned Constitutions do.

Based on the above, since the Constitution of 1871, the tendency in the country has been to prohibit consecutive presidential re-election and allow only non-consecutive presidential re-election.

3. Constitutional and legal provisions related to the presidential system in El Salvador

⁷⁾ In the ruling 163-2013, the CCSCJ recognized that these six provisions ensure compliance with the principle of alternation in the exercise of the Presidency.

⁸⁾ The Constitution uses the expressions "political rights" (*derechos políticos*) and "citizenship rights" (*derechos de ciudadanía*) as synonyms for referring to the same concept. Article 72 enumerates the political rights to which Salvadorans are entitled. Those rights are (a) exercise of suffrage; (b) to associate oneself to constitute political parties and to join those already formed; and (c) to opt for public posts.

⁹⁾ According to the Salvadoran Constitution, citizenship rights can be suspended (Article 74) or lost (Article 75). In both cases, citizens are not entitled to exercise the rights enumerated in Article 72 while those rights are suspended or lost. In the case of loss of citizenship rights, the Supreme Court of Justice can restore those rights by an explicit declaration of rehabilitation.

The CCSCJ⁷ and Salvadoran experts in constitutional law interviewed by Arévalo (2022) of Voice of America have recognized at least six provisions in the current Constitution that limit presidential re-election. Those provisions are: (a) Article 75 (4); (b) Article 88; (c) Article 131 (16); (d) Article 152 (1); (e) Article 154; and (f) Article 248 (4).

3.1 Article 75 (4) of the Constitution

Article 75 (4) of the Constitution establishes that the citizenship rights⁸ are lost⁹ by those who subscribe to acts, proclamations, or adherences to promote or support the re-election or continuation of the President of the Republic, or who employ direct means leading toward this end.

This provision seeks to avoid consecutive presidential re-election in the country by imposing the sanction of suspension of citizenship rights of those citizens who promotes the presidential re-election. Citizens who lost their citizenship rights cannot

vote, associate to constitute political parties, or join those already formed and opt for public posts.

3.2. Article 88 of the Constitution

Article 88 enshrines the principle of alternation in the exercise of the Presidency of the Republic (*alternabilidad en el ejercicio de la Presidencia de la República*). For this provision, the rotation of the Presidents of the Republic is indispensable for maintaining the established form of government and political system and provides that the insurrection is an “obligation” if this provision is violated.

As is evident, the primary purpose of Article 88 of the Constitution is to assure the “rotation” in the presidency. The “insurrection” to which this provision refers is not only an obligation but also a “right.” Article 87 of the Constitution defines the right of the people to insurrection (*derecho del pueblo a la insurrección*) as a mechanism whose sole object is to reestablish the constitutional order altered by the transgression of Article 88, for example. In this sense, an insurrection is not a mechanism for justifying a *Coup d'état*, the abrogation, or the reform of the current Constitution. Article 87 constrains its sphere of application by limiting it to the removal and replacement of transgressing officials until they are substituted in the form established by the Constitution.

3.3. Article 131 (16) of the Constitution

Article 131 (16) of the Constitution states that it corresponds to the Legislative Assembly to obligatorily disavow the President of the Republic or his substitute if, when his constitutional term of five years has ended, he continues in the exercise of his post.

This provision compels the deputies to disavow the President if he refuses to leave the presidency at the end of his term and is directly connected to Article 154 of the Constitution, which establishes the presidential period and prevent any President from staying past his term.

3.4. Article 152 (1) of the Constitution

Article 152 (1) of the Constitution provides that the person who has filled the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six months prior to the beginning of the

presidential period cannot be candidate for the office of President of the Republic.

This provision aims that a different person is elected in each presidential term by prohibiting Presidents from standing as election candidates.

Even though this provision seeks to ensure the rotation of the presidency over the Salvadoran constitutional history, its interpretation has given some headaches in the past. Article 152 (1) of the Constitution of 1983 finds its first roots in Article 82 (2) of the Constitution of 1886, which established that the citizen who has held the office of constitutional President (*Presidencia constitucional*) of the Republic during the last six months of the presidential period¹⁰ cannot be elected President for the following period. Gallardo (1961) explains that because this provision contained the expression “constitutional President,” it was maliciously interpreted over time and, as a result, produced harmful effects (p. 121). According to Gallardo (1961), the *de facto* governments that ruled between the end of the 1800s and the first years of the 1900s justified their actions by arguing that Article 82 (2) of the Constitution of 1886 did not apply to them because they were not constitutional presidential governments but *de facto* ones (p. 121). Because of this interpretation, the *de facto* governments gained power via unconstitutional means by considering themselves excluded from the scope of application of this provision (Gallardo, 1961, p. 121). As a result, the *de facto* governments obtained better treatment than constitutional governments because the former did not consider itself bound by the prohibition of presidential re-election, but the latter were expected to comply with it (Gallardo, 1961, p. 121).

¹⁰ At the time, the presidential period was four years (Article 82 (1) of the Constitution of 1886).

¹¹ The Constitution of 1939 substituted the expression “constitutional President” for the expression “*en propiedad*.” The expression “*en propiedad*” indicates that the President of the Republic did not temporarily fill the presidency. The Constitution of 1950 did not include neither of these two expressions. The Constitutions that followed the one of 1950, and with some changes in the duration of the Presidency’s term and its time of initiation and finalization, basically copied the redaction of the Article 62 of the Constitution of 1950. In this sense, Article 152 (1) of the Constitution of 1983 is a copy, with some modifications, of Article 62 of the Constitution of 1950.

At present, the most recent problem of interpretation of Article 152 (1) of the Constitution of 1983 is not related to the expression “the Constitutional presidency” because this expression is no longer included in the text of this provision¹¹. Nowadays, the most recent problem of interpretation of Article 152 (1) is related to “who” and “when” a citizen can run for the presidency. In this respect, it is essential to mention that according to the statement of reasons given on 22 July 1983 by the Constituent Drafting Committee of the current Constitution, “only candidates may become Presidents of the Republic.” This phrase im-

plies that only those who meet the criteria for running as candidates, if elected, may become Presidents, excluding, by logic, all those who do not even meet the requirements for running as candidates. Hernández (2021) explains very clearly the aim of Article 152 (1) as follows:

The only reason why Art. 152 (1) refers to “candidate” is because it is regulating who can run for president, establishing an explicit ban to any person that acted as president in the “*the period immediately prior*” to the presidential term in which candidates are running for president. (“2. - The “unconstitutional mutation” adopted by the new Constitutional Chamber” section)

As will be explained below, the CCSCJ has interpreted Article 152 (1) in a way that is favorable to the current President of the Republic for the period 2019-2024, allowing him to run for continuous re-election.

3.5. Article 154 of the Constitution

Article 154 states that the presidential period shall be of five years, and shall begin and end on the first of June, without the person who exercised the Presidency being able to continue in his functions one day more (*ni un día más*).

It is important to emphasize that the above expression in Spanish “*ni un día más*” was used for the first time in the Constitution of 1841, and since then it has been repeatedly used in most of the Salvadoran Constitutions, excluding the ones of 1824, 1864, 1883, and 1939¹². It has been carefully selected by most of the Constituent Drafting Committees that have drafted the Salvadoran Constitutions over the history of the country to make it clear that the President can stay in office for an exact period and “not a single day more,” imposing in this way a strict limit on the presidential term of office.

3.6. Article 248 (4) of the Constitution

Article 248 (4) states that under no circumstances can the provisions of the Constitution, which refer to the rotation of the Presidents of the Republic, be amended.

¹²As explained before, the Constitution of 1824 and the Constitution of 1864 stipulated that the President could be consecutively re-elected only once. The Constitution of 1883 stated that the President of the Republic’s term of office was four years, and it did not refer to the possibility of consecutive presidential re-election. Regarding the Constitution of 1939, this Constitution made an exception to the application of Article 94 and allowed President Maximiliano Hernández Martínez to continue in office until 1 January 1945 due to “national interests.”

In the Salvadoran constitutional doctrine, there is a concept called “petrified clauses” (*cláusulas pétreas*), also known as “eternity clauses.” The provisions that form part of the petrified clauses are those that under no circumstances can be amended and prevent the reforming legislator from amending given matters from the text of the Constitution at its convenience. The provisions connected with the rotation of the Presidents of the Republic that limit their term in office form part of the petrified clauses and, as a result, are unamendable by any means (including constitutional interpretation by CCCSJ). As González-Jácome (2017) explains, any attempt by the legislator or the judiciary to amend the petrified clauses of the Constitution may be considered “abusive constitutionalism.” For example, González-Jácome (2017) remarks that abusive constitutionalism “tends to consolidate power of incumbents by extending their terms in office, among other things” (p. 451).

3.7. Article 23 (a) of the Political Parties Act

The recitals of the PPA mention that political parties are “fundamental tools” of the political system. Article 4 of the PPA states that political parties should participate lawfully and democratically in the electoral process, and this participation must respect the “current constitutional framework.” In this sense, Article 23 (a) of the PPA prohibits political parties from promoting “consecutive presidential reelection.” This prohibition has been included in the PPA because consecutive presidential re-election is incompatible with the democratic system and the form of government established in the Constitution.

3.8 Interpretation of the provisions that prohibit presidential re-election

Anaya (Frente a Frente TCS, 2022), a well-renowned Salvadoran Constitutionalist, explained in a popular morning talk show¹³ how the provisions of the Constitution mentioned above that prohibits consecutive presidential re-election should be interpreted and understood.

To explain those provisions, Anaya (Frente a Frente TCS, 2022) uses a metaphor and explains that each provision is part of a “house.” According to him, Article 88 of the Constitution is the “house’s foundation” because the principle of alternation in the

¹³) Due to the sudden announcement of the current President that he would run again for the presidency in 2024, most of the analysis regarding this issue has been made in television programs or online congresses on Constitutional Law. It is worth mentioning that the Salvadoran Constitutional Law doctrine on this point is still scarce and is under development.

exercise of the Presidency of the Republic is an indispensable element of the Salvadoran form of government and political system.

Further, Anaya describes that Article 154 and Article 248 (4) of the Constitution are two provisions that “materialize” the principle of alternation in the exercise of the Presidency of the Republic (in other words, these two provisions strengthen the foundation of the “house”). Article 154 of the Constitution is the first reinforcement because it states that the presidential term is “five years,” beginning and ending on June 1 and that the President cannot remain in office one day more than he should (five years). The second reinforcement is Article 248 (4) of the Constitution which establishes that under no circumstances can the provisions of the Constitution, which refer to the rotation of the Presidents of the Republic, be amended.

Then, Anaya explains that Article 75 (4) and Article 131 (16) of the Constitution are two pillars that build and open the “door” to alternation in the Presidency of the Republic, which at the same time are “sanctions” for those who do not adhere to this principle. According to Anaya, the first pillar (and sanction) is established in Article 75 (4) of the Constitution which states that the citizenship rights are lost by those who promote or support the re-election or continuation of the President of the Republic. Then, the second pillar (and sanction) established in Article 131 (16) of the Constitution states that the President who continues in the exercise of his post even though his constitutional term has ended must be “disavowed” by the Legislative Assembly, which must designate a provisional President. As explained by Anaya, in El Salvador, there had never been any doubt about the prohibition of continuous presidential re-election, and no one questioned this fact in the past. Throughout history, the debate regarding presidential re-election has centered on “how many years” must pass before a former President can participate again as a candidate for the Republic’s Presidency.

Once it is clear that continuous presidential re-election is prohibited and the door to non-consecutive presidential re-election is open, Anaya comments that Article 152 (1) of the Constitution is the “roof of the house,” in the sense of providing a ceiling of how many years a former President must wait to run again for office. Because this provision does not explicitly state how long a

former President must wait to run again for office, the CCSCJ, in ruling 163-2013, interpreted that a former President must wait ten years to run again for office. The logic behind the CCSCJ interpretation will be explained below.

The analysis provided by Anaya of the provisions which prohibits consecutive presidential re-election in El Salvador is important for the following reasons. First, because his explanation was addressed to an audience not well-versed in constitutional topics, he tried to convey his ideas straightforwardly while using easy-to-understand explanations. Second, and as it is going to be explained below, the CCSCJ justified the consecutive presidential re-election of the current President in the interpretation of one phrase of Article 152 (1) of the Constitution without considering (or ignoring) all the other provisions of the Constitution that explicitly prohibits the consecutive presidential re-election of Presidents. As Anaya explains, when interpreting constitutional provisions, it is essential to consider constitutional principles, values, and the ideology behind them to find an adequate approach and avoid contradictions in the interpretation of constitutional provisions. In other words, when interpreting constitutional provisions, it is essential to “look at the big picture” and not place too much reliance on the mere words or a small individual element (or phrase) of a single constitutional provision.

4. Main rulings of the CCSCJ that had interpreted the provisions related to the country’s presidential system

The main two rulings of the CCSCJ that had interpreted the provisions related to the country’s presidential system are the ruling 163-2013 and the ruling 1-2021.

It should be noted that each ruling was dictated by the CCSCJ in different times of the constitutional history of El Salvador. Each ruling will be explained in detail below.

¹⁴⁾ The constitutional lawsuit known as “action of unconstitutionality” is the route by which a citizen can challenge laws, decrees, regulations, or normative acts for being contrary to the Constitution and ask the CCSCJ to invalidate them with *erga omnes* effects (Article 183 of the Constitution). Any Salvadoran citizen has standing to bring this type of constitutional lawsuit without alleging the injury or violation of an individual right by the challenged law, decree, or regulation.

¹⁵⁾ In El Salvador, the SET is the highest authority in electoral matters.

¹⁶⁾ Article 11 of the Law on Illicit Enrichment of Public Officials and Employees establishes that lawsuits for enrichment without just cause may be brought within ten years after the date on which the public official or employee ceased to hold the position whose exercise may have given rise to such enrichment.

4.1. Ruling 163-2013

In 2013, two citizens filed before the CCSCJ a constitutional lawsuit known as “action of unconstitutionality” (*proceso de inconstitucionalidad*)¹⁴, asking the CCSCJ to declare unconstitutional a resolution of the Supreme Electoral Tribunal (SET)¹⁵, which authorized a person who was President for the period 2004-2009 to run again as a presidential candidate for the elections held on 2 February 2014. The plaintiffs argued that the resolution of the SET was unconstitutional because it violated the Constitutional provisions prohibiting presidential re-election and guaranteeing the presidency’s rotation system in the country.

In 2014, the CCSCJ held in the ruling 163-2013 that the resolution of the SET was unconstitutional because the principle of alternation in the exercise of the Presidency of the Republic requires the elapse of two terms of office (ten years) before the eventual reelection of the same person. As explained by Merino (2021):

Finally, the Constitutional Chamber of the Supreme Court had interpreted in its jurisprudence that the prohibition of immediate presidential reelection covered not only leaving a presidential term in between, but two, since the prohibition includes the nomination as a candidate in the period immediately following the one in which it was exercised the presidency. (p. 121)

The CCSCJ considered that Presidents should finish their five-year term and wait ten years to seek the presidency again, because as explained by Sisco (2022), the CCSCJ was aware that “populist and corrupt Presidents might try to perform all kinds of maneuvers to circumvent term limits” (“Some Background: History of Presidential Term Limits in Salvadoran Constitutionalism” section). Further, a term of ten years favors an unimpeded initiation of an eventual claim for liability for enrichment without just cause (*enriquecimiento sin causa justa*) against those who have illicitly enriched themselves while in the presidency.¹⁶

4.2. Ruling 1-2021

In 2021, a citizen filed a lawsuit demanding the CCSCJ order the loss of political rights of a citizen who promoted the current President's re-election. At the time, the person who promoted the current President re-election was running as a pre-candidate for deputy.

The lawsuit was allowed to go forward by the five Magistrates removed from office on 1 May 2021. After these Magistrates were replaced, the new configuration of the CCSCJ decided in September of 2021 to use the lawsuit as a vehicle for allowing the presidential re-election in the country.

The ruling 1-2021 makes a forced interpretation of Article 152 (1) of the Constitution to condone consecutive presidential re-election even though the six above-mentioned constitutional provisions and the PPA expressly ban it.

As Hernández (2021) explains, the interpretation of Article 152 (1) of the Constitution done by the CCSCJ is based on the “artificial distinction between “presidential candidates” and the President.” This distinction was made to justify “who” can run for the country's presidency and “when” this person can do it. According to the CCSCJ, the Constitution contains prohibitions directed to the presidential candidates and the President in office. The CCSCJ understood that when the Constitution wants to establish a direct prohibition to the President, it does it clearly, as in Article 158 of the Constitution.¹⁷ According to the CCSCJ, Article 152 (1) does not prohibit the President from running for office for a second consecutive term because the Constitution does not explicitly prohibit it¹⁸ and because the phrase “period immediately prior” refers to the period when the President was not yet in office and did not govern. Thus, the prohibition contained in Article 152 (1) of the Constitution is directed against candidates who have had the opportunity to have been President in the immediately preceding period and not to Presidents who want to run for office for a second consecutive term (because according the CCSCJ, in this case, they had not had the opportunity to have been President in the immediately preceding period).

Understanding the logic used by the CCSCJ in its ruling when interpreted Article 152 (1) is not easy. Merino (2021) briefly explains it as follows:

¹⁷) Article 158 of the Constitution establishes that the President of the Republic is prohibited from leaving the national territory without the permission of the Legislative Assembly.

¹⁸) The CCSCJ justifies its reasoning by saying that the Constitution should have established that a citizen who has served as “President of the Republic” cannot be President in the next presidential term.

P is president at time t_1 , therefore, when the Constitution speaks of the “immediately preceding period”, it refers to time t_{-1} , that is, when P was not yet president. Hence, P can run for his re-election at time t_2 . Nevertheless, already being in t_2 , since P was president in t_1 , and that would be his “immediate previous term”, he could no longer run for a third term at time t_3 . (p. 121)

The illogic in the interpretation of Article 152 (1) made by the CCSCJ is blatant. As explained before, only persons who meet the criteria to become presidential candidates can run for office. The President does not meet the criteria to run as a candidate for a consecutive term because the term “period immediately prior” in Article 152 (1) does not refer to when the President was a presidential candidate for the first time (i.e., when he was not yet President). It refers to when the President who wants to run for office again (as a presidential candidate) is in power. If a President cannot even meet the criteria to run as a candidate, it is logical that his path to run for the presidency for a consecutive term is barred. The President who wants to run again for the presidency must sit out for two terms before running again for the role. Any other interpretation made to allow consecutive (or unlimited) presidential re-election may be considered, in the words of Albert (2018, pp.2-3) and Merino (2021, p. 122), a “constitutional dismemberment” or, in the words of Brewer-Carías (2021), a constitutional “mutation” (p. 342).

It is important to mention that there is a difference in criterion between Merino (2021) and Brewer-Carías (2021) regarding what the CCSCJ did in its ruling 1-2021. To Merino, the interpretation done by the CCSCJ in its ruling 1-2021 constitutes a “Constitutional dismemberment.” To substantiate its point, Merino quoted Albert (2018) and explained that Constitutional dismemberment is an effort to repudiate the Constitution’s essential characteristics to dismantle its basic structure. As a result, Constitutional courts become political actors that must reinterpret the Constitution in conformity with those efforts to develop new lines of jurisprudence to overrule inconsistent precedents. On the other hand, to Brewer-Carías (2021), the CCSCJ introduced a constitutional “mutation.” To Brewer-Carías, constitutional mu-

tation consists of when a Constitutional court interprets a constitutional provision in the opposite sense (for example, to interpret a prohibitive norm of the Constitution as permissive) to illegitimately “mutate” the content and meaning of the interpreted provision. When doing so, the Constitutional court abandons (overrule) its previous jurisprudence by calling it, for example, “erroneous.” Even though Albert has explained that Constitutional reform includes events such as “constitutional dismemberment” or “constitutional mutation,” the difference between these two is the “spirit of the court judgment” in the sense of whether it aimed or not to alter the identity or basic structure of the Constitution. In the case of El Salvador, it is clear that the CCSCJ, more than changing the meaning of a Constitutional provision compared to how it was previously understood, aimed to dismantle the basic structure of the Constitution, so it will be more accurate to say that the CCSCJ with its ruling 1-2021 incurred in a Constitutional dismemberment of the Constitution.

The ruling 1-2021 has been considered a direct result of the Technical *Coup d'état* that took place on 1 May 2021, when the five Magistrates of the CCSCJ were illegally replaced before the expiration of their tenures (Fundación para el Debido Proceso et al., 2021). The legitimacy of this decision has been put in doubt and has been widely criticized not only by constitutionalist scholars but also by the international community. The three main reasons why this ruling is criticized are concerns about the legitimacy of the current Magistrates of the CCSCJ, the *ultra-petita* nature of the ruling, and the type of proceeding in which it was given and its legal effects. These reasons are explained briefly in the following.

4.2.1. First issue: dubious legitimacy of the current configuration of the CCSCJ

As mentioned before, on 1 May 2021, the new deputies of the Legislative Assembly for the period 2021-2024 took office, and just right after their appointment, they decided to irregularly dismiss all the legitimate Magistrates of the CCSCJ and appoint their replacements. The removal of the Magistrates was done in violation of Article 172 of the Constitution which guarantee judicial independence and “the Inter-American standards for the removal of justice operators, such as due cause, right of defense

and due process” (The Inter-American Commission on Human Rights, 2021, para. 1). The repeated clash between the removed Magistrates of the CCSCJ and the current President is one of the main reasons why they were removed. This decision of the Legislative Assembly has been broadly and hardly criticized by the International Community as an intention by the current President of El Salvador to control the CCSCJ through the Legislative by removing the fragile checks and balances system that existed in the country until 1 May 2021. For example, the United Nations High Commissioner for Human Rights (2021) at that time stressed that:

The procedure followed to dismiss all the judges of the Constitutional Chamber of the Supreme Court and the Attorney General did not meet the required due process standards, which is a breach of international human rights law and a direct attack on judicial independence. (para. 5)

Because of the current configuration of the CCSCJ, this has been labeled as the “imposed Constitutional Chamber by the Legislative Assembly” (*Sala de lo Constitucional impuesta por la Asamblea Legislativa*) (Vilches, 2022, para. 1), “the captured Constitutional Chamber” (Sisco, 2022, “Eradication of the Presidential Term Limit by Adjudication” section), “spurious Court” (*Corte espuria*) (Valencia, 2022, para. 4), “illegitimate Chamber” (*Sala ilegítima*) (Luers, 2022, para. 3), among others. Anaya (Frente a Frente TCS, 2022) went further by saying that “since 1 May 2021, El Salvador has not had a Constitutional Chamber.”

Given the above, the legitimacy of the ruling 1-2021 is questionable because the appointment of the current Magistrates of the CCSCJ was not conducted transparently. Some critics of this resolution do neither acknowledge nor accept the ruling 1-2021 and use terms such as “sham ruling” (*presunta resolución*) (Olmedo, 2022a, para. 2) or “dirty paper” (*papel chuco*) (Anaya, 2021) to refer to it in a derogatory way and deny its enforceability. The logic behind this disavowal is that this ruling is a “fruit” of a “poisonous tree,” and if the tree is tainted, so is its fruit.

4.2.2. *Second issue: violation against the non-ultra petita principle*

The *non-ultra petita* principle (also known as the *non-ultra petita* rule) is a recognized general procedural principle of law that limits the scope of the Court's jurisdiction to provide appropriate relief concerning a dispute. This principle requires and ensures that a Court does not go beyond the claims requested by the plaintiff.

In this case, the CCSCJ failed to adhere to the *non-ultra petita* principle because it did not abstain from deciding points not included in the plaintiff's claim. The plaintiff only asked the CCSCJ to decide whether it was appropriate or not to declare the loss of citizenship rights of a Salvadoran citizen who promoted or supported the re-election or continuation of the current President of the Republic for considering that this behavior was against Article 75 (4) of the Constitution. As will be explained later, the CCSCJ dismissed the claim for lack of evidence, and in this case this "should have been the only ruling adopted" (Hernández, 2021, "3.- Presidential reelection and "Constitutional authoritarian populism" section). Nevertheless, in an *obiter dictum*, the CCSCJ also addressed the topic of presidential re-election and interpreted Article 152 (1) in a way that allowed it in the country.

In this case, the judicial *modus operandi* of the CCSCJ amounts to a clear violation of the *non-ultra petita* principle because the CCSCJ decided about the possibility of presidential re-election in the country even though the plaintiff did not raise this question in the suit.

4.2.3. *Third issue: nature of the ruling, legal effects, and its enforceability*

This third issue can be analyzed from three perspectives: first, the nature of the ruling; second, the legal effects of a ruling in constitutional actions for declaring the loss of citizenship rights; and third, the enforceability of a ruling issued by a dubious Court.

First, regarding the nature of the ruling, the CCSCJ decided to dismiss (*sobreseer*) the case on the ground that the lawsuit was improperly allowed to go forward by the five Magistrates removed from office on 1 May 2021 and because the evidence submitted by the plaintiff for proving its allegations was not "sufficiently

reliable.” In constitutional lawsuits, a dismissal is known as an “abnormal way of terminating the proceeding” (*forma anormal de finalización del procedimiento*). According to the CCSCJ, a dismissal differentiates from a final judgment because a dismissal is not a judgment on the case’s merits (Sala de lo Constitucional, n.d., “e. - Sentencia” section). In ruling 1-2021, the CCSCJ purposely mistook the nature of its decision when addressing the topic of presidential re-election because it made arguments and interpreted Article 152 (1) as if it were issuing a final judgment on the case’s merits even though this issue was not part of the ratio decidendi of the case.

Second, rulings given in a constitutional action for declaring the loss of citizenship rights produce *inter partes* effects only. Because of the nature of this type of constitutional complaint, the CCSCJ does not have jurisdiction to render *erga omnes* judgments. In constitutional matters, only in the actions of unconstitutionality the CCSCJ has jurisdiction to declare the unconstitutionality of a legal provision with binding effects in the entire country.

Third, the current configuration of the CCSCJ cast doubt on the enforceability of this ruling. Is it enforceable a ruling issued by a Court whose judges were dubiously appointed? Rakowska-Trela (2020) answers this question: “A judgment given with the participation of persons not entitled to adjudicate is invalid, non-existent” (para. 14). In this sense, and if a judgment by a dubious Court is invalid, it becomes difficult to accept that the ruling 1-2021 is enforceable. Consequently, continuous presidential re-election is still prohibited by the Constitution and valid case law of the CCSCJ.

5. Is presidential re-election really allowed in El Salvador?

For more than 182 years in El Salvador, the Constitutions have enshrined the “principle of no presidential re-election,” which consists of a prohibition against consecutive presidential re-election. This principle’s primary purpose is to avoid the concentration of power in a single person by prohibiting Presidents from remaining in power for two (or more) consecutive terms.

The principle of no presidential re-election is closely connected with the principle of alternation in the exercise of the presidency. According to Gallardo (1961, p. 121), Presidential democratic rotation is a requirement related to the supreme functions of the Presidency of the Republic. Presidential rotation is indispensable for maintaining the established form of government and political system of the country due to the strong position that the President holds in government. Violating those principles may have effects in the long run. Those effects may be, for example, the weakening of the system of checks and balances to undermine the separation of power, the rule of law, and democratic principles in the country.

Even though the current President has managed to use the judicial interpretation of the current configuration of the CCSCJ to circumvent the presidential term limit stated in the Constitution for trying to remain in power for two (or more) consecutive terms, the six above-mentioned constitutional provisions, Article 23 (a) of the PPA and the ruling 163-2013 are still in force and still applicable. In other words, consecutive presidential re-election in El Salvador is still prohibited, and only non-consecutive presidential re-election is allowed in the country.

6. Final remarks

In El Salvador, since the Constitution of 1871, the historical and legal tendency regarding presidential re-election has been to prohibit consecutive presidential re-election and allow only non-consecutive presidential re-election.

The CCSCJ and Salvadoran experts in constitutional law have recognized at least six provisions in the current Constitution that prohibits consecutive presidential re-election. Further, Article 23 (a) of the PPA explicitly prohibits political parties from promoting “consecutive presidential reelection.”

Consecutive presidential re-election has been prohibited because is “synonymous with dictatorship” (Rauda, 2021). To prevent dictators from entrenching themselves in power, the principle of alternation in the exercise of the Presidency of the Republic aims to ensure the rotation of Presidents, considering it indispensable for maintaining the established form of government and democratic political system of the country. The rotation of the

presidency is important because “(...) presidential term-limits prevent the monopoly of power by a strong individual and the possibility of a president for life, and thus protects a republic from becoming a de facto dictatorship” (Anaughe, 2022, para. 10).

According to the Salvadoran Constitution, the President can stay in office for five years and “not a single day more.” Further, according to ruling 163-2013, the principle of alternation in the exercise of the Presidency of the Republic requires the elapse of two terms of office (ten years) before the eventual re-election of a former President. In other words, the President is elected by popular vote for five years and cannot be re-elected for two consecutive periods.

The CCSCJ, in the ruling 1-2021, tried to overrule the ruling 163-2013 and reform the country’s presidential system by making a forced interpretation of Article 152 (1) of the Constitution to condone consecutive presidential re-election by eliminating the constitutional term limit for the presidential office, even though six constitutional provisions and the PPA expressly ban it.

Despite the above, the ruling 163-2013 is still in force. As explained before, the legitimacy of the current Magistrates of the CCSCJ cast a shadow over the ruling 1-2021 and called into question its legal effects. Through the ruling 1-2021, the CCSCJ unconstitutionally amended the so-called “eternity clauses” (which cannot be amended) related to the country’s presidential system to rewrite them at the current President’s convenience and pleasure. The current President has happily endorsed the ruling 1-2021. As Olmedo (2022b) explains, the core of the current President’s justification regarding continuous presidential re-election was that “other countries allow it” (para. 1).

Amending Constitutions through rulings of the Judiciary Branch is a trend that has been around for a while in Central America. For example, a former President of Honduras and the current Nicaraguan dictator President used rulings of the Constitutional Chamber of the Supreme Court of Justice of both countries controlled by them to allow their re-elections. El Salvador has done the same when copying and pasting the method implemented in the two countries mentioned above.

Constitutionalist scholars have considered the amendment of the so-called eternity clauses related to the country’s presidential

system as a “constitutional dismemberment,” which substantially modifies the structure and identity of the Salvadoran Constitution and the democratic presidential system into place, which explicitly prohibits consecutive presidential re-election.

Considering all the above, it is appropriate to conclude that in El Salvador, consecutive presidential re-election is still prohibited by the Salvadoran Constitution, current law in force, and legitimate case law of the CCSCJ. Any person who considers himself a law expert in constitutional matters cannot turn a blind eye to this fact.

References

- Albert, R. (2018). Constitutional Amendment and Dismemberment. *The Yale Journal of International Law*, 43 (1), 1-84. Retrieved from: <https://www.readcube.com/articles/10.2139%2Fssrn.2875931>
- Anaughe, G. (2022, May 10). In Defence Of Zoning And Power Rotation In Nigeria. *Vanguard*. Retrieved from: <https://www.vanguardngr.com/2022/05/in-defence-of-zoning-and-power-rotation-in-nigeria/>
- Arévalo, K. (2022, September 19). ¿Cómo puede postularse Nayib Bukele a la reelección? *La Voz de América*. Retrieved from: <https://www.vozdeamerica.com/a/plan-nayib-bukele-reeleccion-presidente-el-salvador-/6753352.html>
- Brewer-Carías, A. (2021). EL JUEZ CONSTITUCIONAL EN EL SALVADOR Y LA ILEGÍTIMA MUTACIÓN DE LA CONSTITUCIÓN De cómo la Sala Constitucional de la Corte Suprema de El Salvador convirtió la “prohibición” constitucional de reelección inmediata del Presidente de la República en un “derecho” a ser reelecto inmediatamente. *Revista de derecho público*, (167-168), 339-342. Retrieved from: <https://dialnet.unirioja.es/servlet/articulo?codigo=9220554&orden=0&info=link>
- Frente a Frente TCS. (2022, September 22). *FRENTE A FRENTE 22 DE SEPTIEMBRE 2022* [Video file]. Retrieved from: <https://www.youtube.com/watch?v=OcFA7GL7laY>
- Fundación para el Debido Proceso, Latin America Working Group,

- Fundación Internacional de Seattle, Oficina en Washington para Asuntos Latinoamericanos and Cristosal Centroamérica. (2021, September 9). *Joint Statement on El Salvador's Constitutional Court Paves Way for President Bukele to Seek Reelection Following Purge of Country's Judiciary*. Retrieved from: <https://www.wola.org/2021/09/el-salvador-president-reelection-judiciary/>
- Gallardo, R. (1961). *Las Constituciones de El Salvador* (Vol. 14, Issue 1). Madrid, España: Ediciones de la Cultura Hispánica.
- González-Jácome, J. (2017). From abusive constitutionalism to a multilayered understanding of constitutionalism: Lessons from Latin America. *International Journal of Constitutional Law*, 15 (2), 447–468. doi: <https://doi.org/10.1093/icon/mox017>
- Hernández, J. (2021, September 10). The Constitutional Chamber in El Salvador and Presidential Reelection: Another Case of Constitutional Authoritarian-Populism. [Message in a blog]. Retrieved from: <https://www.icconnectblog.com/the-constitutional-chamber-in-el-salvador-and-presidential-reelection-another-case-of-constitutional-authoritarian-populism/>
- Luers, P. (2022, August 31). Carta a los que tienen dudas: La reelección es inconstitucional. *El Diario de Hoy*. Retrieved from: <https://www.elsalvador.com/opinion/cartas-de-paolo/carta-paolo-luers-reeleccion-inconstitucional/992985/2022/>
- Merino, M. (2021). El Salvador. In R. Albert, D. Landau, Pietro F., Simon D. & Rocío D.C. (Eds.), *I-CONnect, 2021 Global Review of Constitutional Law* (pp. 119-123). Trieste, Italy: Edizioni Università di Trieste.
- Olmedo, D. (2022a, May 18). La reelección presidencial en El Salvador. [Message in a blog]. Retrieved from: <https://dplfblog.com/2022/05/18/la-reeleccion-presidencial-en-el-salvador/>
- Olmedo, D. (2022b, September 19). Reección presidencial: Copiarle a quienes están bien. *FACTum*. Retrieved from: <https://www.revistafactum.com/reeleccion-copiar/>
- Rakowska-Trela, A. (2020, October 24). A Dubious Judgment by a Dubious Court: The abortion judgment by the Polish Constitutional Tribunal. [Message in a blog]. Retrieved from: <https://verfassungsblog.de/a-dubious-judgment-by-a-dubious-court/>
- Rauda, N. (2021, November 19). La reelección en El Salvador es sinónimo de dictadura. *El Faro*. Retrieved from: <https://>

elfaro.net/especial/bicentenario/la-reeleccion-en-el-salvador-es-sinonimo-de-dictadura.html

Sala de lo Constitucional. (n.d.). *Proceso de Inconstitucionalidad*. Corte Suprema de Justicia, República de El Salvador. Retrieved from: <https://www.csj.gob.sv/sala-de-lo-constitucional-proceso-de-inconstitucionalidad/>

S. Enrique Anaya [@enrique_anayasv]. (2021, September 4). *Hola. Con esto cierro hoy: a) lo que hoy se publicó por las personas que CAPRES impuso el 1/mayo, NO ES ni resolución, ni sentencia.* [Tweet] X. https://twitter.com/enrique_anayasv/status/1434027929151868932

Sisco, J. (2022, April 27). Unconstitutional Eradication of Presidential Term Limits: The Case of El Salvador. [Message in a blog]. Retrieved from: <https://blog-iacl-aidc.org/new-blog-3/2022/4/27/unconstitutional-eradication-of-presidential-term-limits-the-case-of-el-salvador>

The Inter-American Commission on Human Rights. (2021, May 3). *The IACHR condemns the removal of the judges of the Constitutional Chamber of the Supreme Court of Justice without respect for due process and urges El Salvador to preserve the rule of law.* [Press release]. Retrieved from: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/110.asp

United Nations High Commissioner for Human Rights. (2021, May 4). *El Salvador: Dismissal of Constitutional Chamber and Attorney General seriously undermines the rule of law – Bachelet.* [Press release]. Retrieved from: <https://www.ohchr.org/en/2021/05/el-salvador-dismissal-constitutional-chamber-and-attorney-general-seriously-undermines-rule>

Valencia, R. (2022, September 19). Al buscar la reelección, Bukele recrea la vieja historia del caudillo latinoamericano. *The Washington Post*. Retrieved from: <https://www.washingtonpost.com/es/post-opinion/2022/09/19/nayib-bukele-reeleccion-el-salvador-discurso/>

Vilches, A. (2022, February 18). Organizaciones señalan retrocesos en primeros 100 días de la Sala de lo Constitucional impuesta. *Diario Co Latino*. Retrieved from: <https://www.diariocolatino.com/organizaciones-senalan-retrocesos-en-primeros-100-dias-de-la-sala-de-lo-constitucional-impuesta/>

